Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHROP CORPORATION,

Petitioner,

v.

UNITED STATES *ex rel.*
LEOCADIO BARAJAS,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether, under the civil False Claims Act, 31 U.S.C. § 3730(e)(4), an individual who first discovers all of the information on which his allegations are based from the news media may still qualify as an "original source" of those allegations, and thereby maintain subject matter jurisdiction in the district court.

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PETITION FOR A WRIT OF *CERTIORARI*

Northrop Corporation ("Northrop") petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) was ordered published and reported at 5 F.3d 407. The opinion of the district court (App., *infra*, 12a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1993. A timely petition for rehearing was denied on December 29, 1993 (App., *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTE

The Civil False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, is reprinted in the Appendix (App., *infra*, 21a-31a). This petition specifically involves 31 U.S.C. § 3730(e)(4) which provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT

A. Introduction

The *qui tam* jurisdictional provisions of the civil False Claims Act, set forth in 31 U.S.C. § 3730(e)(4), reflect Congress' attempt to seek "the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own ...."

United States ex rel. Springfield Terminal Railway Co. v. Quinn, No. 92-7157, 1994 U.S. App. LEXIS 1963 at *9 (D.C. Cir. 1994).[1] The very efficacy of the statute, therefore, depends upon a proper interpretation and application of those provisions by the federal judiciary. Five U.S. Courts of Appeals have ruled that the Act establishes a two-part test for determining jurisdiction: First, the Court must determine whether the allegations or transactions on which the action is based were "publicly disclosed." Second, if public disclosure has occurred, the Court must determine whether the *qui tam* plaintiff qualifies as an "original source." Only the Ninth Circuit has merged these two separate inquiries into a single test involving a determination of whether the *qui tam* plaintiff "played some part, whether direct or indirect, in the public disclosure of the allegations . . . ." App., *infra*, 8a. In combining these two inquiries, the Ninth Circuit has ignored the language of the Act, contradicted the rulings of five (5) other Circuits, and effectively undermined the very purpose of the jurisdictional limits as articulated and established by Congress.

B. The Statutory Scheme

The civil False Claims Act, originally known as the "Lincoln Law," was passed during the Civil War to allow the United States to recover for fraudulent claims submitted to the Government. The Act now provides for treble damages, plus penalties of $5,000 to $10,000 for each false claim. From its inception, the False Claims Act included "*qui tam*" provisions allowing individuals, called "relators," to sue on behalf of the United States even if the Department of Justice chose not to prosecute the civil action. Originally, the Act allowed the relator to recover 50 percent of any recovery. The Act now allows a relator to receive an award of between 25 percent and 30 percent if the Government does not intervene and take over the case.

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[1] A *qui tam* relator sues on behalf of the United States. The phrase "*qui tam*" is the abbreviation for the phrase "*qui tam pro domino rege quam pro seipso*," which means "he who as much for the king as for himself."

The original 1863 language of the statute had no restrictions on the types of allegations that could be asserted by private *qui tam* relators. As a result, this Court ruled in 1943, in the now-famous case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537(1943), that a *qui tam* relator who filed a civil False Claims Act case based solely on public information in a criminal indictment could recover up to 50 percent of the amount recovered by judgment or settlement. This decision, roundly criticized as allowing "parasitic" suits, resulted in the 1943 amendments to the Act which granted subject matter jurisdiction over a *qui tam* suit only if the United States had no prior knowledge of the information or the allegations before the *qui tam* suit was filed.[2]

The jurisdictional requirement of no "prior government knowledge" sharply limited private *qui tam* enforcement. In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the court dismissed on jurisdictional grounds a *qui tam* action brought by the State of Wisconsin even though the State had developed the fraud case and presented it to the Federal government for prosecution before filing the *qui tam* action. The court dismissed the action based on the United States' "prior knowledge" of the allegations — knowledge supplied by the State. 729 F.2d at 1103. The decision in *Dean* was an important factor in Congress' decision to amend the Act in 1986. In these 1986 amendments, Congress sought to achieve a reasonable balance: on the one hand, overturning decisions such as *Dean* and encouraging private citizens and state governments in ferreting out and pursuing fraud against the Government; while on the other hand, disallowing mere "parasitic" suits such as in the *Hess* case, where private citizens simply refile as allegations

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[2] An early draft of the 1943 legislation provided that a *qui tam* relator could prosecute the action if that relator was an "original source" of the allegations. That provision was deleted in the final version of the bill. *See United States ex rel. LeValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1354-55 (D. Mass. 1988).

information already disclosed in the public media and receive up to 30 percent of any judgment or settlement.

The balance Congress sought to achieve is reflected in the language in 31 U.S.C. § 3730(e)(4) of the Act. Subsection 3730(e)(4)(A) provides that no court shall have subject matter jurisdiction over a suit brought by a *qui tam* relator if the suit is based on "the public disclosure of allegations or transactions" unless the relator is an "original source" of the information. Subsection 3730(e)(4)(B) of the Act defines an "original source" as one who (1) "has direct and independent knowledge of the information on which the allegations are based," *and* (2) "has voluntarily provided the information to the Government before filing a [*qui tam*] action."

Since enactment in 1986, the "original source/public disclosure" provisions have been the subject of numerous district and appellate court decisions. Five U.S. Courts of Appeals - the Second, Third, Seventh, Tenth and District of Columbia Circuits — and numerous federal district courts have ruled that § 3730(e)(4) means what it says, holding that federal courts have no jurisdiction over cases brought by relators who base their lawsuits solely on *public* allegations. In contrast, the Ninth Circuit has adopted a test that conflicts both with the rulings of these Courts of Appeals and with Congress' plain intent by interpreting Section 3730(e)(4)(B) to allow jurisdiction where the relator bases his allegations on a publicly-disclosed indictment, lacks any direct and independent knowledge, and does not provide any information to the Government regarding the allegations prior to filing suit. Thus, the Ninth Circuit ruled that there is jurisdiction over a claim brought if the relator only "plays some part in the public disclosure" of the allegations.

C. Factual Background

1. Plaintiff Leocadio Barajas was a test engineer at Northrop's Western Service Department ("WSD") in Pomona, California. WSD was part of Northrop's Precision Products

Division ("PPD") in Massachusetts. Northrop had a subcontract with the Boeing Company to build and test one component of the Air Launched Cruise Missile ("ALCM"). That component was known as a "Flight Data Transmitter" or "FDT." From 1985 to 1987, both upon instructions from his supervisors in California, and on his own initiative, Barajas falsified a number of tests and inspections required to be performed on the Flight Data Transmitter. In January 1987, Barajas and another Northrop employee disclosed these test and inspection falsifications at Barajas' facility in California to Federal investigators, who immediately began to investigate the allegations.

2. In October 1987, Barajas filed a *qui tam* suit under the False Claims Act based solely on these same test and inspection falsifications. The Department of Justice investigated Barajas' allegations at length, intervened in the *qui tam* suit, and filed an amended complaint. Barajas did not oppose the Government's amended complaint and failed even to serve his own original complaint. The United States and Northrop ultimately settled this testing and inspection case for $8 million in July 1991. Barajas and his then co-plaintiff, as part of a separate settlement agreement, agreed to the dismissal of the Government's case and all individual wrongful discharge claims for a payment of $750,000. Barajas (and his former co-plaintiff) also received from the government, in addition to this $750,000, an additional $864,000 of the $8 million as a "bounty" or reward for "blowing the whistle" on the test and inspection fraud at WSD.[3]

3. In the meantime, in April 1989, a Federal grand jury in Los Angeles issued an Indictment charging Northrop as follows:

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[3] Barajas would normally have been entitled to a minimum of 15 percent, or $1.2 million, of the $8 million settlement. The district court, however, reduced his award to 11 percent under 31 U.S.C. § 3730(d)(3), in part because of his voluntary personal involvement in the test falsifications. Barajas did not appeal the district court's ruling.

- First, that WSD personnel in California (including Barajas) had falsified test and inspection reports on the Flight Data Transmitter. These were the allegations in Barajas' original *qui tam* complaint. Northrop ultimately pled guilty to these charges.
- Second, that Northrop PPD personnel in Massachusetts had knowingly *designed* the gyroscope installed in the FDT to use damping fluid that did not meet the cold temperature requirements in the Air Force contract. Northrop vigorously fought these allegations and the Government ultimately dismissed them with prejudice. Barajas played no role in the design phase, which obviously took place years before the test and inspection falsifications and in a separate facility in Massachusetts. Northrop bitterly fought these allegations, and they were ultimately dismissed with prejudice by the government.

4. In the proceedings below, the District Court found — as a matter of *fact* — that the "damping fluid/cold temperature" allegations in the Indictment arose from a lead obtained by the Assistant U.S. Attorney in grand jury testimony and not from Barajas' *qui tam* suit. Assistant U.S. Attorney Fahey explained the discovery of these gyroscope damping fluid allegations in a Declaration submitted to the District Court as part of an *amicus* brief filed by the Department of Justice in support of Northrop's motion to dismiss:

> 2. I supervised the criminal investigation that led to the indictment of Northrop . . . Among the documents that I reviewed was a memorandum that stated that the damping fluid that Northrop was using in the FDTs would freeze at cold temperatures. This memorandum and others produced with it was the first information that the government received regarding Northrop's use of defective damping fluid in the FDTs. It was these documents that triggered the

government investigation of the damping fluid problem.

3. The government was unaware of the fluid issue before we received the documents responsive to the subpoena. The subpoena that led to production of the documents concerning the fluid problem actually addressed a separate matter concerning the ball bearings used in some of the FDT gyroscopes.

4. The matter concerning the ball bearings was developed in grand jury testimony. That testimony was not provided by Leo Barajas and had no relation to any information he provided. [CR 342].

5. This April 1989 Indictment, including the damping fluid/cold temperature allegations, was highly publicized in the local and national media, with substantial coverage in the Los Angeles area where Northrop's headquarters are located and where Barajas and his counsel reside. After the Indictment and the attendant publicity, counsel to Barajas for the first time contended that his original *qui tam* complaint also included these "damping fluid" allegations, even though his original complaint made no mention of "cold temperature," "damping fluid," or any other related allegation. Both Northrop and the Department of Justice disagreed with Barajas, and the District Court twice ruled that these cold temperature/damping fluid allegations were wholly unrelated to the testing allegations he had raised and were not included in the civil case.[4]

6. In fact, it was not until March 1991 — two years after public disclosure of these allegations in the Indictment — that

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[4] As a result, it is conclusively determined, for purposes of this appeal, that the damping fluid allegations (a) were not alleged by Barajas in his original 1987 *qui tam* suit, (b) were not alleged by the Government when it intervened and filed its First Amended Complaint in that suit, and (c) were not alleged in any *qui tam* action prior to public disclosure of those allegations in the 1989 Indictment.

Barajas served his own "First Amended and Severed *Qui Tam* Complaint" which set forth in an entirely separate action, for the first time, the damping fluid/cold temperature allegations. In answers to interrogatories and in deposition testimony, Barajas admitted that the allegations in his Amended *Qui Tam* Complaint were "based upon" the public Indictment, and that he had first heard of the damping fluid allegations from news media reports, "probably" in the *Los Angeles Times*. Indeed, the allegations in Barajas' complaint virtually repeat, word for word, the allegations of the Indictment. The Government did not intervene in this new damping fluid/cold temperature case.

D. Proceedings Below

1. Northrop moved to dismiss Barajas' Amended *Qui Tam* Complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), a motion supported by the Department of Justice. The District Court issued a Memorandum and Order (App., *infra*, 12a-19a) dismissing Barajas' "First Amended and Severed *Qui Tam* Complaint" for lack of subject matter jurisdiction. Based on these facts and the language of 31 U.S.C. § 3730(e)(4)(A), the District Court ruled that these new allegations were "publicly disclosed" before Barajas first raised them in his Amended *Qui Tam* Complaint. App., *infra*, 14a-16a. The court also ruled, based on Barajas' admission that he learned about the damping fluid/cold temperature allegations from the public media, that Barajas did not satisfy the original source requirements of Section 3730(e)(4)(B) because: (1) he did not have direct and independent knowledge of the information on which the damping fluid allegations were based; and (2) if he had any such information, he never provided that information to the Government before filing his *qui tam* suit. App., *infra*, 16a-19a.

2. On December 29, 1993, the Court of Appeals for the Ninth Circuit reversed. The decision ignored the District Court's factual findings (1) that the "damping fluid/cold tem-

perature" allegations were based upon publicly disclosed information, and (2) that Barajas had no "direct and independent knowledge" of these allegations and reversed the District Court's conclusion that Barajas was not an original source. The Ninth Circuit contradicted the prior rulings of the Second, Third, Seventh and Tenth Circuits by instead fashioning its own test that has no basis in the relevant statutory language or legislative history. Thus, the decision created a single "trigger" test — that is, if a relator "play[s] any part" in (or "triggers") an investigation of allegations which lead to a public disclosure of different allegations, by however circuitous and attenuated the route, the relator would satisfy the original source requirements of Section 3730(e)(4).

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant *certiorari* to resolve a conflict in the Circuits concerning the subject matter jurisdiction of the federal courts in *qui tam* cases and the proper interpretation of Section 3730(e)(4). Since the 1986 amendments were passed, there have been at least ten Circuit court decisions interpreting the "original source" and "public disclosure" provisions of Section 3730(e)(4), and at least twice as many district court decisions. Many of these decisions resulted from motions made by the Department of Justice, which filed an *amicus* brief here in the District Court urging dismissal of Barajas' cold temperature allegations. As the civil False Claims Act becomes a more common tool not only in procurement fraud, but also in combating health care fraud, setting the proper interpretation of what constitutes "public disclosure" and "original source" is essential. With different rules in different Circuits, recovery of a reward by a relator now depends not on whether recovery is appropriate based on the legislative intent adopted by Congress, but on the geographic location where the relator manages to bring suit.

Resolution of the jurisdictional issue is particularly critical now in light of the Supreme Court's recent denial of the petition for *certiorari* in *The Boeing Company v. United States of America ex rel. Kelly*, No. 93-817, which involved a challenge to the constitutionality of the *qui tam* provisions.[5] The jurisdictional limits established by Congress now stand as the crucial means by which parasitic suits are to be avoided. Thus, this Court should grant *certiorari* to decide whether the Ninth Circuit's fashioning of the "trigger" test is the appropriate interpretation of Section 3730 or whether the decisions of the Second, Third, Seventh, Tenth and District of Columbia Circuits, which implement the literal language and Congressional intent of Section 3730, are correct.[6]

A. The Ninth Circuit's "Trigger" Test For Original Source Status Conflicts With The Rulings Of Five Other Circuit Courts Of Appeals

Section 3730(e)(4) provides that a suit brought by a *qui tam* relator under the False Claims Act is barred if it is based on publicly disclosed allegations or transactions unless the United States intervenes (in which case, subject matter jurisdiction is established on the basis of the Attorney General's active role) or unless the *qui tam* relator is an "original source." Section 3730(e)(4)(A) defines "public disclosure" to include disclosure in a criminal indictment or in the news media. The definition

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[5] The Supreme Court denied the petition on February 22, 1994.

[6] *See United States ex rel. Dick v. Long Island Light Co.*, 912 F.2d 13 (2d Cir. 1990); *United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, No. 92-7157, 1994 U.S. App. LEXIS 1963 (D.C. Cir. 1994); *United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *Houck on Behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); and *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993).

of "original source" is set forth in the next section, 31 U.S.C. § 3730(e)(4)(B), which defines an "original source" as an individual who (1) "has direct and independent knowledge of the information on which the allegations are based," and (2) "has voluntarily provided that information to the Government before filing a [*qui tam*] action."

In *United States ex rel. Dick v. Long Island Lighting Co.*, the Second Circuit required that a relator (1) have direct and independent knowledge of the information on which the allegations are based *and* (2) provide that direct and independent information to the Government, pursuant to Subsection (e)(4)(B). *Dick*, 912 F.2d at 16. The Second Circuit, after reviewing the legislative history, then added a *third* requirement to establish "original source" status:

> ¶ (4)(A) contains an *additional* requirement to be considered an 'original source,' namely, that to be considered an 'original source,' one must have been a source to the entity that first publicly disclosed the information on which a suit is based. (Emphasis added). [*Dick*, 912 F.2d at 17].

In *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), the Ninth Circuit, in direct reliance on the express language of Section (e)(4)(B), stated:

> Where an allegation has been publicly disclosed within the meaning of section 3730(e)(4)(A), a plaintiff may only bring a *qui tam* suit if he can show that (1) he has 'direct and independent knowledge of the information on which his allegation is based'; and (2) that he 'has voluntarily provided the information to the Government before filing' his *qui tam* action. 31 U.S.C. § 3730(e)(4)(B). [975 F.2d at 1417].

In addressing the mandatory requirement in Subsection (e)(4)(B) that the relator "have direct and independent knowl-

edge of the information on which the allegation is based," the *Wang* court explained:

> Wang had personal knowledge of the Bradley's transmission problems because he worked (however briefly) on trying to fix them. The fact that someone else publicly disclosed the Bradley's transmission problems does not rob Wang of what he saw with his own eyes. Wang's knowledge of the transmission problems was 'direct and independent' because it was unmediated by anything but Wang's own labor. *Id.*

Thus, the *Wang* Court found that "direct and independent knowledge" is personal, such as the knowledge of an eyewitness, and concluded that Mr. Wang had such personal knowledge. In so holding, the Ninth Circuit was following the rulings of the Second, Third, Seventh and Tenth Circuits.

Despite finding that Mr. Wang had such "direct and independent knowledge of the information on which the allegations are based," as required by Subsection (e)(4)(B), the Ninth Circuit held that he was not an original source because he failed to satisfy an *additional* requirement in Section 3730(e)(4)(A). Citing the Second Circuit's decision in *Dick*, the *Wang* court held:

> The Second Circuit has held that, under section (4)(A), a *qui tam* plaintiff 'must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.' *Dick*, 912 F.2d at 16. We agree with the Second Circuit. To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit. [*Id.* at 1418].

In its decision in *Barajas*, however, the Ninth Circuit expanded its holding in *Wang* to transform this *additional* requirement — triggering the public disclosure — into the *only*

requirement, stating: " . . . Barajas is 'an original source' with respect to a proposed amendment [*i.e.*, the new damping fluid allegations] if he *played some part*, whether direct or indirect, in the public disclosure of the allegations that are the subject of the proposed amendments." App., *infra*, 8a. (emphasis added).

The other Circuits which have addressed this issue have ruled *unanimously* that a *qui tam* suit under the False Claims Act, in which the Government does *not* intervene, must be dismissed for lack of subject matter jurisdiction under Section 3730(e)(4) where the *qui tam* relator did not have "direct and independent knowledge of the information on which the allegations are based." None of the courts adopted the "trigger" test as the sole basis for "original source" status. None of these courts stated that a relator satisfies the "original source" test if, without having direct and independent knowledge of the information, he or she simply "'played some part' in the public disclosure" of the allegations. App., *infra*, 8a.

In contrast to the Ninth Circuit's decision in *Barajas*, the District of Columbia Circuit held in *Springfield Railway* that other Circuits had properly construed the definition of original source "to impose a conjunctive requirement — direct and independent — on qui tam plaintiffs." *Springfield Railway*, 1994 U.S. App. LEXIS at *38. The District of Columbia Circuit went on to hold that the Act required "direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at *40. The Tenth Circuit in *Precision* went even farther and specifically held that a relator must have *personal* knowledge of *all* information on which the relator's allegation is based. 971 F.2d at 554. In *Stinson*, the Third Circuit ruled that, to be an original source, "the relator must possess substantive information about the particular fraud, rather than merely background information . . . ." 944 F.2d at 1160. Moreover, said the Third Circuit Court of Appeals, that information must be direct and not obtained through "interme-

diaries." *Id.* In *Kreindler*, the Second Circuit held that the relator must be dismissed since he had "no significant direct knowledge" of the alleged wrongdoing. 985 F.2d at 1159. In *Houck*, the unsuccessful relator would not have learned of the allegations "absent public disclosure." 881 F.2d at 505 (1989). All of these decisions conflict with the new single "trigger" test established by the Ninth Circuit.[7]

The trigger test adopted by the Ninth Circuit in *Barajas* as the *sole* requirement for original source status is in reality the

[7] The Ninth Circuit's rationale for its departure from *Dick*, *Precision*, *Houck*, *Stinson*, and even *Wang* is based upon its recitation of a statutory provision and legislative history which have *nothing* to do with this case. In interpreting Section 3730(e)(4), the Ninth Circuit relies on the language and legislative history of § 3730*(d)(1)*, without understanding the critical difference between Subsection (d) and Subsection (e)(4).

The Ninth Circuit properly states that under Subsection (d)(1), a relator may rely on publicly disclosed information. What the Ninth Circuit does not recognize is that Subsection (d)(1), which begins with the phrase "If the Government proceeds with the action . . .," is limited *by its express terms* to situations in which the Government intervenes as a party, and is concerned *solely* with how much may be awarded to a *qui tam* plaintiff in that situation. In such cases, there is no question of subject matter jurisdiction because the Government is an active party plaintiff in the suit. The Ninth Circuit wholly ignores this critical distinction, which causes the Ninth Circuit's decision in *Barajas* to conflict directly with the Tenth Circuit's decision in *Precision*, where the Court of Appeals explained:

> [Relator] asserts § 3730(d)(1) supports its interpretation that only actions *solely* based on public disclosures are potentially barred. We disagree. Although § 3730(d)(1) allows the court to determine fees in a *qui tam* action partly based on public information, § 3730(d)(1) is not a jurisdictional provision. Moreover, its application is limited to those cases in which the government proceeds. The government has elected not to proceed in the present case; therefore § 3730(d)(1) is not germane to this analysis. [971 F.2d at 553 n.3].

Since the government has not intervened in Barajas' Amended *Qui Tam* Complaint containing these new allegations, Section 3730(d)(1) is likewise "not germane" to this case.

same as the *third* mandatory requirement set by the Second and Tenth Circuits. The existence of this *third* requirement — "playing a part" in the public disclosure — was recognized as an additional requirement by the Tenth Circuit in *Precision*. 971 F.2d at 553 n.4.

These Circuit decisions in *Dick* and *Precision* establish also that meeting this "trigger" test — "playing a part in the public disclosure" — is only one step in determining whether a relator is an original source. If the relator "played a part" in the public disclosure, the additional statutory requirements in Subsection (e)(4)(B) must then be proven by the *qui tam* relator. Under these Circuit court decisions, if Barajas "played a part in the public disclosure," he satisfies only the first test under Subsection (e)(4)(A); he still must satisfy Subsection (B) — that is, he must have had "direct and independent knowledge of the information" regarding the damping fluid allegations and must have "voluntarily provided that information to the Government," as required by the express terms of Subsection (B).

In sum, the Ninth Circuit in *Barajas* has transformed a *third* jurisdictional requirement into the *sole* test for original source status and eliminated the clear statutory mandate in Section (e)(4)(B) — that a relator have "direct and independent knowledge of the information on which the allegation is based and voluntarily provide that information to the government." This misapplication of precedent, and misreading of the law, leads to the absurd result of a relator being the "original source" of allegations he first learns of in the newspaper.

B. The Ninth Circuit's "Trigger Test" for Public Disclosure Conflicts With The Clear Statutory Language Of The False Claims Act And Established Precedent

The Ninth Circuit, while citing the District Court's factual findings that Barajas' damping fluid claims were raised *after* the public Indictment and widespread published media reports of

the Indictment, App., *infra*, 9a, rejected the District Court's ruling that the damping fluid allegations in Barajas' Amended *Qui Tam* Complaint were "based upon" publicly disclosed information. The Ninth Circuit reached this anomalous result by ignoring the language of the statute, the unchallenged findings of fact, and the holdings of the Second, Third and Tenth Circuits.

The statutory language is clear:

> § 3730(e)(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal . . . hearing . . . or from the news media . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Applying this language to the undisputed facts found by the District Court, there should be no doubt that this "action" — the relator's Amended *Qui Tam* Complaint raising the damping fluid allegations for the first time — is "based upon the public disclosure of allegations" in the Indictment and the news media.

Despite Barajas' admissions that he based his cold temperature allegations on a public Indictment and the media reports, the Ninth Circuit concluded as follows:

> We stated in *Wang* that "[e]vidence publicly disclosed for the first time during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A)." 975 F.2d at 1416. In this case, the deficiency in the damping fluid was not disclosed during civil discovery, but as a result of the government's criminal investigation, which in turn may have been based on information Barajas had provided to the government. Barajas argues, and we agree, that there is no reason to draw a distinction

> between disclosure resulting from civil discovery by the government or a *qui tam* plaintiff, and disclosure resulting from a criminal investigation by the government based on information provided by a *qui tam* plaintiff. App., *infra* 9a.

The Ninth Circuit's adoption of the same "trigger" test used for its "original source" analysis not only ignores the statutory language quoted above and the District Court's factual findings, but directly conflicts with precedent in other Circuits.

1. *Barajas* Is In Clear Conflict With The Circuit Decisions in *Stinson* and *Kreindler*

The Third Circuit in *Stinson*, and the Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies*, both ruled that allegations which were disclosed during routine discovery in a civil case were "publicly disclosed" for purposes of Section 3730(e)(4)(A). In both of these cases, the *qui tam* relators were the attorneys who had filed the civil litigation and sought the discovery in which the allegations were disclosed. Therefore, under the Ninth Circuit test set forth in *Wang* and *Barajas*, there is no doubt that Mr. Stinson and the firm of Kreindler & Kreindler "played some part" in the public disclosure of the allegations in civil discovery. Yet both the Second and Third Circuits found there had been "public disclosure" and dismissed these cases.

The Ninth Circuit's decision in *Barajas* conflicts with the Second and Third Circuits. Without mentioning *Stinson* or *Kreindler*, the Ninth Circuit ruled that the cold temperature allegations were not "publicly disclosed" as to Barajas if he "played some part" in the investigation which resulted in the disclosure. This is directly at odds with *Stinson* and *Kreindler & Kreindler*. There is no doubt that the facts in *Barajas* would have resulted in dismissal by the Second and Third Circuits.

2. The Ninth Circuit's New Rule Conflicts With The Tests Set Forth By The Tenth Circuit In *Precision*

In its ruling in *Barajas*, the Ninth Circuit has held that there is only *one* test for satisfying Section 3730(e)(4), that is, "playing some part" in the public disclosure. The Court has thus merged the "public disclosure" test with the "original source" test. The Tenth Circuit in *Precision* specifically warned against merging the "public disclosure" and the "original source" tests:

> These two inquiries should not be collapsed. The district court was absolutely correct in concluding the 'unless' clause of this provision is not implicated until the 'based upon' issue is resolved. * * * However, we disagree with the *Le Valley* court's analysis insofar as it collapsed the two separate inquiries of § 3730(e)(4)(A) and (B). [971 F.2d at 552-553 n.2].

Moreover, the clear, objective test for public disclosure established by Congress in Subsection (e)(4)(A) becomes highly subjective: whether a suit is based on publicly disclosed allegations comes to depend on the person bringing the suit, not on whether the allegations were in fact "publicly disclosed" before the suit was filed. The result is that allegations are "publicly disclosed" to the entire world except for the person who "played a part" in the public disclosure.

Finally, the Ninth Circuit made an enormous logical leap — without any precedent or support whatsoever — by equating information generated by the relator from the fruits of his or her own discovery labor with information generated by the Government in a wholly separate investigation. The *qui tam* provisions of the False Claims Act are designed to encourage those who know of fraud to disclose it, as Barajas did with the test falsifications. These provisions are not designed to reward those who seek to enrich themselves on the *Government's* labor.

CONCLUSION

The Ninth Circuit's decision in *Barajas* misinterprets the key jurisdictional provision of the civil False Claims Act. If allowed to stand, parasitic suits will be allowed in the Ninth Circuit, and properly precluded in other circuits. With the constitutionality of these *qui tam* cases no longer before this Court, it is particularly critical that this petition for a writ of *certiorari* be granted to resolve this heavily litigated jurisdictional issue and bring the law in the Ninth Circuit in line with all other Circuits.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.*,
Plaintiff,

and

LEOCADIO BARAJAS, AND PATRICIA MEYER,
Plaintiffs-Appellants,

v.

NORTHROP CORPORATION,
Defendant-Appellee.

No. 92-55092
D.C. No.
CV-87-7288-KN
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
December 8, 1992-Pasadena, California
Filed September 20, 1993

Before: James R. Browning, Mary M. Schroeder, and
Betty B. Fletcher, Circuit Judges.

Opinion by Judge Browning

OPINION

BROWNING, Circuit Judge:

The question is whether the district court has jurisdiction under the False Claims Act (the Act), 31 U.S.C. § 3729 *et seq.*, over claims a qui tam plaintiff added to his complaint by amendment based on information disclosed by the United States in a criminal indictment returned after the plaintiff filed the original complaint.

I.

Boeing Corporation selected Northrop Corporation to produce flight data transmitters for Air Force nuclear cruise missiles. Although the transmitters were required to withstand temperatures as low as -65° Fahrenheit, Northrop allegedly selected a damping fluid that solidified at -50° Fahrenheit, causing the transmitters to fail, and concealed the failure of the transmitters to meet contract requirements by omitting certain tests, falsifying other tests and test results, failing to inspect incoming components, and submitting false claims, all in violation of 31 U.S.C. § 3729(a).

Leocadio Barajas is a former Northrop employee who participated in falsifying test results. In early 1987, Barajas met with federal investigators, gave them tapes of falsified tests, and described failures of the transmitters in performance reliability verification tests. In October, 1987, Barajas and another Northrop employee, Patricia Meyer, filed a complaint for damages under the Act, alleging improper inspection procedures and falsification of test results. *See* 31 U.S.C. § 3730(b)(1) (private person with knowledge of a false claim may file suit "for the person and for the United States Government"). The complaint was filed in camera and served on the government, and further proceedings were stayed while the government determined whether to intervene and take over the action. *See* 31 U.S.C. § 3730(b)(2).[1]

[1] If the government takes over the action, it has "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1). The person who brought

The government did so, and filed an amended complaint adopting the claim that Northrop submitted invoices for tests that were falsified or omitted. Two months after taking over the suit, the government obtained an indictment against Northrop that included both the allegations that Northrop falsified inspection procedures and test results, and allegations that Northrop used inadequate damping fluid in the transmitters. Northrop pled guilty to several counts of the indictment alleging fraudulent inspection and testing. The counts charging damping fluid fraud were dismissed. The civil case alleging fraud in inspection and testing was settled for approximately eight million dollars.[2]

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the action has "the right to continue as a party to the action," subject to various limitations, *id.*, and is entitled to receive 15-25% of the proceeds of the action, unless the action is based primarily on information derived from a government hearing, report, audit, or investigation, or from the news media, in which case the qui tam plaintiff is entitled to no more than 10% of the recovery. 31 U.S.C. § 3730(d)(1).

If the government chooses not to proceed with the action, "the person who initiated the action shall have the right to conduct the action," 31 U.S.C. § 3730(c)(3), and is entitled to receive 25-30% of any recovery, 31 U.S.C. § 3730(d)(2). The Act places two limitations on the qui tam plaintiff's conduct of the action: (1) the government may request that it be served with copies of all pleadings and deposition transcripts, and the court may permit the government to "intervene at a later date on a showing of good cause." 31 U.S.C. § 3730(c)(3), and (2) the government may request a stay of discovery if such discovery would interfere with "the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," 31 U.S.C. § 3730(c)(4).

Whether or not the government takes over the action, the court may reduce the qui tam plaintiff's share of the proceeds if the plaintiff "planned and initiated the violation of section 3729 upon which the action was brought.." 31 U.S.C. § 3730(d)(3). If the plaintiff "is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds." *Id.*

[2] Under the Act, Barajas and Meyer are entitled to a portion of the settlement. *See* 31 U.S.C. § 3730(d) and note 1, *supra*. Northrop also paid Barajas and Meyer $750,000 in settlement of other claims.

The district court allowed Barajas and Meyer to sever the counts of their original complaint not adopted by the government. They then filed an amended complaint that included the damping fluid fraud allegations. Northrop filed a motion to dismiss, arguing jurisdiction over the damping fluid fraud claim was precluded by 31 U.S.C. § 3730(e)(4) because this claim had been publicly disclosed by the government in the indictment and Barajas and Meyer were not its original source. The district court granted the motion.[3]

II.

Congress enacted the False Claims Act to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government," S. Rep. No. 345, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, and chose a civil action for damages on behalf of the United States as the mechanism to encourage individuals with knowledge of fraud to come forward.[4] Although district courts have jurisdiction over false claims actions, Congress limited the class of persons who may sue under the Act. Section § 3730(3)(4)(A) provides, "No court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information."

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[3] Meyer does not appeal the dismissal of the complaint.

[4] *See Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1420 (9th Cir. 1991); S. Rep. No. 345 at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67 ("The proposed legislation seeks . . . to encourage an individual knowing of Government fraud to bring that information forward."); *id.* at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89 ("The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits.").

Congress defined "an original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

To amend his complaint to include an allegation regarding deficient damping fluid, therefore, Barajas must demonstrate either that the information was not "publicly disclosed" within the meaning of the Act despite its appearance in the indictment, or, if the information was "publicly disclosed," that he was "an original source" of that information. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1415-17 (9th Cir. 1992).[5] We think it is possible Barajas may satisfy either or both of these prerequisites for including deficient damping fluid allegations in his false claims action. Both depend on factual findings that must be made by the district court in the first instance, and we remand so the appropriate inquiry can be made.

A. Original Source[6]

[1] The district court ruled that "to qualify as an 'original source,' the relator must have sufficient direct and independent knowledge of the fraud alleged to have taken place to support a claim under the False Claims Act. . . . Merely providing a lead which triggers an investigation does not qualify one as an

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[5] We review the existence of jurisdiction de novo, but we accept the district court's factual findings on jurisdictional issues unless they are clearly erroneous. *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989). As plaintiff, Barajas bears the burden of establishing jurisdiction. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

[6] For purposes of this section, we assume the damping fluid information was "publicly disclosed." As we explain in section B, *infra*, however, Barajas may be able to establish that this information was not publicly disclosed within the meaning of the Act for purposes of this litigation.

'original source.'" The court held Barajas did not meet this test because the information he provided to the government was not sufficient in itself to establish a claim under the Act for false claims involving use of inadequate damping fluid. The court also ruled that even if Barajas had direct and independent knowledge of the damping fluid defect, he would not qualify as "an original source" because he "failed to reveal the information about the fluid/cold temperature violations to the government prior to filing [the] initial *qui tam* complaint in October 1987."

The court below relied on the opinion of the district court in *Wang v. FMC Corp.*, No. C-87-20814-WAI, 1991 U.S. Dist. LEXIS 6683 (N.D. Cal. April 23. 1991), *aff'd*, 975 F.2d 1412 (9th Cir. 1992). On appeal, we rejected the district court's ruling that a qui tam plaintiff can be "an original source" only if he provides enough information to state a claim under the Act. We said, "To bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit." 975 F.2d at 1418.[7]

Wang reflects the language of the statute. The Act refers to "an original source." 31 U.S.C. § 37730(e)(4)(A) (emphasis added), suggesting there may be more than one original source eligible to bring suit, and provides that when a qui tam suit taken over by the government is " based *primarily* on disclosures of specific information" for which the plaintiff was not an original source, 31 U.S.C. § 3730(d)(1) (emphasis added), the qui tam

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[7] We also stated "section 3730(e)(4)(A) requires a *qui tam* plaintiff to have *played some part* in his allegation's original public disclosure," 975 F.2d at 1418 (emphasis added), and stressed that *all* those who 'directly or indirectly' disclose an allegation might qualify as its original source,"*id.* at 1419 (emphasis in original). *See also United States ex rel Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17-18 (2d Cir. 1990); *cf. id.* at 18 (interpretations of the Act should encourage qui tam plaintiffs to bring an action "at the earliest possible time").

plaintiff is limited to 10% of the recovery.[8] The "original source" provision and the 10% provision were added to the act on the floor of the Senate. Senator Grassley, who sponsored the Act and chaired the subcommittee that drafted it, stated the amendments would

> limit the possible portion of the judgment recoverable by a qui tam plaintiff to 10 percent or less when the action is based primarily on public information. This limitation will affect those persons who have brought a qui tam action based *almost entirely on information of which they did not have independent knowledge but had derived from a public source.*

132 Cong. Rec. 20536 (Aug. 11, 1986) (emphasis added); *see also id.* at 28580 (Oct. 3, 1986) (statement of Senator Grassley). The House sponsor, Representative Berman, stated, "A person is an original source if he had some of the information related to the claim which he made available to the government ... in advance of the false claims being publicly disclosed." *Id.* at 29322 (Oct. 7, 1986) (emphasis added). He also observed, "where ... the person qualifies as an 'original source' but where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff ... the court may award up to 10% of the total recovery to the qui tam plaintiff." *Id.*[9]

[2] In light of the language and history of the Act, as interpreted in *Wang*, Barajas is "an original source" with respect to the proposed amendments if he (1) has some direct and

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[8] Because the government retains the right to intervene at any time in any qui tam action on a showing of good cause, 31 U.S.C. § 3730(c)(3), the 10% limitation in § 3730(d)(1) potentially applies to all qui tam suits.

[9] To balance the incentive to bring suit provided by the "original source"and damages provisions, Congress authorized the award of attorney's fees and expenses to prevailing defendants if an action is frivolous, harassing, or vexatious. 31 U.S.C. § 3730(d)(4).

independent knowledge of information on which the proposed amendments are based, and (2) voluntarily disclosed that information to the government before filing the original complaint. *See Wang*, 975 F.2d at 1417. As in *Wang*, Barajas is "an original source" with respect to a proposed amendment if he played some part, whether direct or indirect, in the public disclosure of the allegations that are the subject of the proposed amendments. *See id.* at 1418-19. The answer to this inquiry depends on the facts and circumstances of the individual case, evaluated in light of the central purpose of the Act to encourage persons with knowledge of fraud against the government to come forward with their knowledge.

[3] The record indicates Barajas voluntarily revealed all the information he possessed prior to filing his complaint. Barajas's knowledge of the testing and inspection fraud was direct and independent because he acquired it during the course of his employment at Northrop. Further, Barajas's disclosure that Northrop falsified tests and inspections of flight data transmitters clearly "played some part" in the public disclosure of at least certain aspects of Northrop's cruise missile frauds in the civil complaint and in the indictment. However, the district court did not determine whether the information Barajas originally provided to the government "played some part" in the public disclosure of the damping fluid allegations. If the information supplied by Barajas triggered the criminal investigation that led to the damping fluid allegations, then Barajas "played some part" in the public disclosure of those allegations. We ask the court to address this question on remand.

B. Public Disclosure

The factual inquiry to be made by the district court into the role Barajas's information played in the disclosure of the damping fluid information also bears directly upon whether or not there was a "public disclosure" of this information as that term

is to be defined in light of *Wang*. Indeed, the two questions may turn out to be essentially the same in this case.

[4] The district court found Barajas's damping fluid allegations were based on allegations in the indictment against Northrop. The court's finding was based on Barajas's responses to interrogatories and statements in depositions that he had no specific knowledge that the damping fluid was inadequate until after he left Northrop, and may have obtained his information on this subject from an article in the Los Angeles Times. Barajas does not dispute the court's findings. However, he argues the allegations in the indictment were not "publicly disclosed" for purposes of this litigation.

[5] We stated in *Wang* that "[e]vidence publicly disclosed for the first time during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A)." 975 F.2d at 1416. In this case, the deficiency in the damping fluid was not disclosed during civil discovery, but as a result of the government's criminal investigation, which in turn may have been based on information Barajas had provided to the government. Barajas argues, and we agree, that there is no reason to draw a distinction between disclosure resulting from civil discovery by the government or a qui tam plaintiff, and disclosure resulting from a criminal investigation by the government based on information provided by a qui tam plaintiff. Such a distinction would allow the government to limit the potential recovery of qui tam plaintiffs unfairly simply by initiating a criminal investigation, and would subvert Congress's desire to combat fraud by providing broad incentives for qui tam suits. *See* note 4, *supra*.[10] Accordingly, we remand

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[10] Our decision is consistent with *Stinson*, 944 F.2d at 1159-60. The qui tam plaintiff in *Stinson* - a law firm - claimed the information on which it based its suit was not publicly disclosed because it was revealed during civil discovery in an unrelated lawsuit in which Stinson was counsel to the defendant. *Stinson* holds that information obtained during discovery in an action not brought under the Act may not be used as the basis for an

for the district court to determine whether the government's disclosure of the damping fluid allegations was the result of a criminal investigation that was instigated as a consequence of the information Barajas provided to the government.[11]

III.

In addition to arguing that Barajas could not sue on the damping fluid allegations because they had been publicly disclosed and because he was not the original source of the allegations, Northrop contended in the district court that 1) Barajas cannot litigate the damping fluid allegations because he already accepted the terms of the settlement agreement that the government reached with Northrop after it intervened in Barajas's original action and 2) Barajas cannot inject the damping fluid claim into his original action over the government's objection. If the district court on remand determines Barajas was "an original source" of the damping fluid information or that the damping fluid information was not "publicly disclosed," it must then determine whether Northrop may pursue these independent

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independent qui tam suit by a third party unless that third party is an original source of the information. By contrast, in this case and in *Wang*, the information was disclosed either during discovery in the qui tam action or in a related criminal investigation.

[11] The record is not clear whether the information provided by Barajas that Northrop's Western Service Department (located in California) falsified inspection procedures and test results relating to flight data transmitters influenced the disclosure of the allegations that Northrop's Precision Products Division in Massachusetts used below-specification damping fluid in such transmitters. The district court did not resolve this factual question; it concluded merely that Barajas did not have sufficient "direct and independent knowledge of the fraud alleged... to support a claim under the False Claims Act." Accordingly, it remains unclear whether Barajas's information caused the government to discover evidence of possible misconduct related to damping fluid or whether that discovery was prompted by a source of information wholly independent of Barajas.

arguments against Barajas's claim and decide whether they have merit.

Vacated and remanded for further proceedings. Each side will bear its own costs of appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES ex rel. LEOCADIO BARAJAS and PATRICIA MEYER,

Plaintiffs,

v.

NORTHROP CORPORATION,

Defendant.

CV 87-7288 KN (Kx)
(SEVERED ACTION)

MEMORANDUM OF OPINION AND ORDER RE NORTHROP'S MOTION TO DISMISS QUI TAM PLAINTIFFS' FIRST AMENDED AND SEVERED QUI TAM COMPLAINT

I. INTRODUCTION:

Defendant Northrop Corporation filed its motion to dismiss the Qui Tam Plaintiffs' First Amended and Severed *Qui Tam* Complaint on August 29, 1991. The United States filed a Notice of Joinder in Northrop's Motion on September 30, 1991. The Court, having reviewed and considered the arguments of counsel set forth in their papers, HEREBY GRANTS Northrop and the United States' motion for the reasons set forth below.

II. FACTS:

On October 30, 1987, the *qui tam* plaintiffs, Leocadio Barajas and Patricia Meyer, filed their original complaint against Northrop under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. This original complaint, filed with the Court but never formally served upon Northrop, alleged that Northrop's Western

Service Department, located in the greater Los Angeles area, directed the *qui tam* plaintiffs (the "relators") to falsify test results and employ improper inspection practices during their work on the Flight Data Transmitters ("FDTs") to be used in the Air Force's Air Launched Cruise Missile. After a substantial investigation, the government intervened in the underlying action and filed a first and a second amended complaint, pursuing the relators' allegations of falsified testing and improper inspection of the FDTs.[1] The relators did not object to the government's amended complaints and made no attempt to assert claims that the FDTs failed to operate at cold temperatures — the allegation made in the relators' first amended complaint at issue in this case.

The United States also conducted a separate and distinct criminal investigation, which resulted in the criminal indictment of Northrop and certain of it employees. The First Superseded criminal indictment, issued on June 27, 1989, alleged both testing/inspection allegations and fluid cold temperature allegations. The government alleged, *inter alia*, that Northrop had fraudulently certified that the DC-200 damping fluid used in the FDTs complied with the government's "cold temperature" specifications which required that the fluid be able to withstand temperatures of -65 degrees Fahrenheit without freezing. Subsequent to the United States' dismissal of all the fluid cold temperature allegations against Northrop in the Plea Agreement of February 27, 1990, the relators amended their original civil complaint by adding virtually identical cold temperature allegations as those alleged by the United States in its criminal indictment. The relators filed this Amended and Severed Complaint on March 19, 1991, almost two years after the public disclosure regarding the defective damping fluid. Northrop and

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[1] Northrop has settled these claims with the government for $8 million. The relators may seek up to 25% of that settlement (plus attorneys' fees) from the government under the False Claims Act.

the Untied States now seek to dismiss relators' first amended and severed complaint on the grounds that the relators were not the "original source" of the fluid/cold temperature allegations.

III. DISCUSSION:

Section 3730(e)(4)(A) of the False Claims Act (the "Act"), 31 U.S.C. §§ 3729 *et seq.*, bars private plaintiffs from bringing a cause of action under the Act based upon previously disclosed allegations or transactions unless the person bringing the action is an "original source" of the information. Under the Act's provisions, a plaintiff only qualifies as an "original source" if she (1) has "direct and independent knowledge" of the information on which the allegations are based *and* (2) voluntarily provides this information to the Government before filing her action. 31 U.S.C. § 3730(e)(4)(B). Northrop and the United States contend that the relators in this case meet neither of these requirements and that this Court should therefore dismiss the relators' first amended complaint for lack of subject matter jurisdiction. As the party trying to assert jurisdiction, the relators bear the burden of establishing the Courts' subject matter jurisdiction. *See Farmers Ins. Exchange v. Portage La Prairie Mutual Ins. Co.*, 907 F.2d 911 (9th Cir. 1990).

A. The Relators' Case Was Based Upon Previously Disclosed Allegations

In order to determine whether to apply the "original source" bar of the False Claims Act, the Court must first determine whether or not the fluid/cold temperature allegations contained in the relators' first amended complaint were "based upon the public disclosure" of the government's investigation and subsequent criminal indictment against Northrop. The Court believes that Northrop has persuasively shown that the relators' amended complaint *was* based on such public disclosures rather than on the relators' own personal knowledge. The Court's finding is based upon the following evidence:

(1) In his response to the Defendant's Interrogatory No. 3, in Northrop's First Set of Interrogatories, relator Leocadio Barajas acknowledged that he based his contentions about the cold temperature allegations on "the matters and exhibits contained in the FIRST SUPERSEDING INDICTMENT" in the criminal case against Northrop;

(2) During his second deposition, taken on January 9, 1990, relator Barajas acknowledged that he did not learn that Northrop's flight data transmitters had failed to meet the government's cold temperature specifications until after Barajas left or was discharged from his job at Northrop's Western Service District. Indeed, Barajas testified later in the same deposition that he did not learn of the allegation that Northrop knew that the FDTs could not pass the government's cold temperature test until 1989. *See* Barajas' Second Deposition at page 94, lines 9-17; and at page 96, lines 10-11 and page 98, lines 24 through page 99, line 2; and

(3) Barajas testified at the January 9, 1990 deposition that, although he was not sure where he first heard the allegations that the FDTs had failed the cold temperature tests, he "might have picked it up" by reading the L.A. Times.[2] *See* Barajas' Second Deposition at page 99, line 15.[3] The Court finds, on the

[2] On April 12, 1989, one day after the original criminal indictment was issued, the Los Angeles Times published a front page article about the United States' allegations that Northrop knew that the flight data transmitters' gyroscopes would freeze at temperatures between 40 degrees and 50 degrees below zero Fahrenheit.

[3] The Court also takes notice of the fact that the relators made no reference to the fluid/cold temperature claims in their initial complaint and that the allegedly fraudulent "cold temperature" tests performed on the FDTs, in which Northrop is alleged to have fraudulently certified that the DC-200 damping fluid complied with the government's specifications, were performed at Northrop's Precision Products Division in Norwood, Massachusetts. Since the relators worked at Northrop's Western Service Department in the Los Angeles area, defendant argues that it was unlikely if not impossible for the relators to have had first hand knowledge of this allegedly fraudulent testing. The relators have not presented any evidence to rebut this assertion.

basis of this evidence, that the "cold temperature" claims made by the relators' first amended and severed complaint were based on previous "public disclosures" of the allegations against Northrop. In order to establish jurisdiction, the relators must therefore prove that they were the "original source" of the information regarding the failure of the FDTs to pass the fluid/cold temperature tests.

B. The Relators Were Not an "Original Source" of the Cold Temperature" Allegations Made in Their First Amended and Severed Complaint

In order to qualify as an "original source" under section 3703(e)(4)(B) of the False Claims Act, relators must satisfy a two-pronged test: they must show (1) that they had "direct and independent" knowledge of the information upon which the fluid cold temperature allegations were made; and (2) that they voluntarily provided that information to the government prior to filing their *qui tam* action. The relators have failed to satisfy either of these conditions.

Since relator Barajas has acknowledged in his answers to Northrop's interrogatories and in his deposition testimony that he learned about Northrop's use of defective damping fluid from the public disclosures by the government and the news media, his knowledge of the fluid/cold temperature issue cannot be characterized as "independent" or "direct".[4] *See Houck on behalf of United States v. Folding Carton Admin. Committee*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1471 (1990); *United States ex rel. Stinson v. Prudential Ins. Co. of Amer.*, 736 F. Supp. 614, 622-23 (D. N.J. 1990). Although Barajas claims that the statements he made in those interrogatories and depositions are misleading, neither he nor Ms. Meyer

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[4] Relator Patricia Meyer has failed to introduce any evidence to this Court's knowledge that she had "direct"and "independent"knowledge of Northrop's alleged fluid/cold temperature violations.

have presented any evidence to support a finding that they had direct or independent knowledge about Northrop's alleged fluid/cold temperature violations.[5]

Instead, relators argue that Mr. Barajas should be considered an "original source" because the United States would not have discovered that the DC-200 damping fluid did not meet the government's cold temperature specifications "but for" Mr. Barajas' initial complaint. More specifically, Barajas argues that he should be considered an "original source" since he informed a Special Agent in the Air Force Office of Special Investigations ("OSI") in the summer of 1987 that "most of the failures [in the FDT tests] occur during the first power start-up subsequent to each unit being exposed to sub-zero temperatures." *See* Plaintiffs' Brief in Opposition at 7. Barajas contends that this statement helped "trigger" the government's investigation and that he should consequently be considered an "original source" under section 3730(3)(4).

This court believes that Barajas' argument is wrong as a matter of law. The case law and the plain language of the statute require that a relator have direct and independent knowledge of the information upon which the allegations are based to qualify as an "original source". *See, e.g., United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990). This standard is significantly more stringent than the "but for" standard advocated by Barajas. In *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, 1991 U.S. Dist. LEIS 6683 (N.D. Ca. 1991), for instance, the court ruled that the possession of a small amount of knowledge was insufficient to satisfy the "original

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[5] The Court also notes that the relators' original complaint made no specific references to the damping fuel allegations contained in the first amended complaint and that, according to the United States, the relators provided no fluid cold temperature information to the government prior to the filling of the initial *qui tam* complaint. Government's Memorandum In Opposition to Relators' Motion for an Evidentiary Hearing, dated June 17, 1991, at 4, 18.

source" requirement. In order to qualify as an "original source," the relator must have sufficient direct and independent knowledge of the fraud alleged to have taken place to support a claim under the False Claims Act.

In the instant case, relators Barajas and Meyers have presented no evidence that they had direct knowledge of the failure of the DC-200 damping fluid to perform up to specifications. Barajas' statement to the OSI agent did not specify which FDT component failed, why it had failed, or whether the DC-200 damping fluid had anything to do with the failure.[6] Barajas thus lacked sufficient information of the alleged fraud to support a cause of action under the False Claims Act. Merely providing a lead which triggers an investigation does not qualify one as an "original source."

Even if the relators had direct and independent knowledge of the defects in the DC-200 damping fluid, however, they would still not qualify as an "original source," since they failed to reveal the information about the fluid/cold temperature violations to the government prior to filing their initial *qui tam* complaint in October 1987. Section 3730(e)(4)(B) of the False Claims Act explicitly requires that relators must have "voluntarily provided the information [upon which their claims are based] to the Government before filing an action" in order to qualify as an "original source." 31 U.S.C. § 3639(e)(4)(B). Even if Barajas was aware of Northrop's fluid/cold temperature

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[6] Northrop asserts, moreover, that the "start-up"problems Barajas referred to in his comments to the OSI officer are unrelated to the cold temperature allegation because even if the damping fluid were to "freeze"during a test, it would not prevent the gyroscope wheel from "starting-up." *See* Northrop's Reply at 19, n.10; and Joint Declaration of Thomas Farmer and Richard Gilbertson, Exhibit 18 of Northrop's Reply Brief. Since the relators have not responded to or denied the validity of this declaration, the Court accepts it as confirming Northrop's assertion that the relators had no "direct" knowledge that the DC-200 damping fuel failed to meet government specifications.

violations while he was employed by Northrop, he did not provide that information to the United States until his second deposition in January 1990, more than two years after filing his original complaint. Barajas' comment to the OSI agent in 1987 that the FDTs often experienced start-up problems in sub-zero temperatures was not sufficiently related to the allegations of fraud in Barajas' amended complaint to qualify as voluntarily informing the government of the basis of these later claims. Barajas' comment did not reveal any knowledge on his part that DC-200 damping fluid failed to meet the government's cold temperature specifications, which is the basis of the relators' claim in their amended complaint.

IV. CONCLUSION:

For the foregoing reasons, the Court hereby finds that the relators in the instant case do not qualify as an "original source" under section 3730(e)(4) of the False Claims Act. The Court therefore lacks subject matter jurisdiction over the relators' first amended and severed complaint and dismisses that complaint with prejudice.

IT IS SO ORDERED.

DATED: December 20, 1991

/s/

David V. Kenyon
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *ex rel.*,
Plaintiff,

and

LEOCADIO BARAJAS, AND PATRICIA MEYER,
Plaintiff-Appellant,

v.

NORTHROP CORPORATION,
Defendant-Appellee.

No. 92-55092
D.C. No.
CV-87-7288-KN

ORDER

Before: BROWNING, SCHROEDER, and FLETCHER, Circuit Judges

The panel has voted to deny the petition for prehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FALSE CLAIMS ACT

31 U.S.C.

§3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. — Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or

employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that —

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C)at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED. — For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. — For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. — Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION. — This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

§3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. —

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. —

(1)If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action

would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that

certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d)AWARD TO QUI TAM PLAINTIFF. —

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph,

receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceedings, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such ex-

penses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED. —

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. — The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.— In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.